Khoo Hi Chiang v Public Prosecutor and another appeal

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 05–191–89 AND 05–192–89
ABDUL HAMID OMAR LP, JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
24 DECEMBER 1993

Criminal Procedure *— Close of prosecution's case — Charge of trafficking in dangerous drugs — Duty of court — Not to undertake minimal evaluation of evidence by prosecution — Court must undertake maximum evaluation of evidence to determine whether prosecution had established charge against accused beyond a reasonable doubt*

Criminal Procedure *— Drug trafficking — Judge applied wrong test at the end of the prosecution's case — Whether substantial injustice had occurred — Courts of Judicature Act 1964 s 60*

Criminal Procedure *— Trial — Whether prosecution had established beyond a reasonable doubt that there was common intention between two accused — Penal Code (FMS Cap 45) s 34 — Criminal Procedure Code ss 173(f), 180, 190, 214 and 259(1)*

Criminal Procedure *— Close of prosecution's case — Duty of court — Whether court was under duty to inform defence of principal points of prosecution's case against them — Whether appellants suffered prejudice as a result*

Evidence *— Expert evidence — Qualifications — Whether necessary to show expertise and experience of witness — Evidence Act 1950 s 45*

Both appellants were convicted in the High Court at Penang for trafficking in a dangerous drug, to wit, raw opium in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. They appealed and their appeals were heard together. In the appeal it was argued, inter alia, that: (i) the judge was wrong in ruling that the appellants had a case to answer relying on the test laid down by Lord Diplock in *Haw Tua Tau v PP*[7] which requires only a minimal evaluation of the evidence at the close of the case for the prosecution to ensure that it was not inherently incredible. The onus on the prosecution at the close of its case was not to establish a prima facie case but to tender evidence which if unrebutted would warrant a conviction; (ii) the prosecution had failed to prove the competence of the government chemist as it was not shown that he had expertise or experience in the analysis of dangerous drugs, in particular opium; (iii) the prosecution had failed to establish beyond reasonable doubt a common intention between the two appellants as laid down in s 34 of the Penal Code (FMS Cap 45); and (iv) the judge, when calling for the defence, had failed to call the attention of the defence to the principal points in prosecution's case against them.

Held, dismissing the appeals:

(1) (Per **Abdul Hamid Omar LP**) It was clear that the evidence of the chemist on the identity and weight of the drugs was factual evidence and not opinion evidence within the meaning of s 45 of the Evidence Act 1950. The question of adducing evidence to show the expertise of the chemist does not arise. However, expertise and qualification of an expert witness must be established where the evidence consists of not only direct factual observation but of opinion.

Cases referred to
The Torenia [1983] 2 Lloyd's Rep 210 (refd)
Rooker v Rooker 164 ER 1379 (refd)
PP v Ang Soon Huat [1991] 1 MLJ 1 (refd)
State of Gujarat v Shantaben AIR 1964 Gujarat 136 (refd)
Munusamy v PP [1987] 1 MLJ 492 (folld)
PP v Lam San [1991] 3 MLJ 426 (refd)

(2) (Per **Edgar Joseph Jr SCJ**) The duty of the court at the close of the case for the prosecution is to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible, ie the *Haw Tua Tau* test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

(3) Although the judge applied the wrong test when calling for the defence, the error was of no consequence and did not vitiate the convictions, because even if he had applied the more stringent test, the result would have been the same having regard to the absolutely overwhelming nature of the case of the prosecution. No substantial injustice had actually occurred and the court applied the proviso to s 60 of the Courts of Judicature Act 1964.

(4) There was ample evidence in this case from which the only and inevitable inference to be drawn from the facts was that there was a common intention on the part of the appellants to commit the offence charged to wit the offence of trafficking in raw opium and that they did commit the offence in furtherance of such common intention.

(5) The appellants were represented by experienced counsel, neither of whom had applied to the court to state the reasons for calling on the defence and there was no trace of either appellant having suffered any prejudice by reason of the judge's omission to explain the principal points in the evidence for the prosecution which told against the appellants.

Cases referred to
Haw Tua Tau v PP [1981] 2 MLJ 49 (not folld)
PP v Lee Yee Heng [1938] MLJ 117 (folld)

PP v Goo Kian [1939] MLJ 291 (folld)
Chin Yoke v PP [1940] MLJ 47 (folld)
PP v Jessa Singh [1940] MLJ 56 (folld)
PP v Fong Ah Tong & Cheong Chi Shen [1940] MLJ 240 (folld)
PP v Lim Teong Seng & Ors [1946] MLJ 108 (refd)
Hoh Keh Peng v PP [1948] MLJ 3 (refd)
PP v Annuar bin Ali [1948] MLJ 38 (refd)
PP v Lam Kim Pau & Ors [1948] MLJ 116 (refd)
PP v R Balasubramaniam [1948] MLJ 119 (folld)
Mohamed Yatin bin Abu Bakar v PP [1950] MLJ 57 (refd)
Soo Sing & Ors v PP [1951] MLJ 143 (folld)
V Daniel v PP [1956] MLJ 186 (refd)
PP v Lee Ee Teong [1953] MLJ 244 (refd)
Wong Yiap Long & Anor v PP [1955] MLJ 132 (not folld)
Mohamed Kassim v R [1956] MLJ 212 (refd)
PP v Saimin & Ors [1971] 2 MLJ 17 (refd)
Ong Kiang Kek v PP [1970] 2 MLJ 283 (refd)
A Ragunathan v PR [1982] 1 MLJ 139 (not folld)
Munusamy v PP [1987] 1 MLJ 492 (not folld)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (not folld)
Mah Kok Cheong v R [1953] MLJ 46 (refd)
R v Barker (Note) (1975) 65 Cr App R 287 (refd)
R v Galbraith 73 Cr App R 124 (refd)
Mahbub Shah v King-Emperor 72 IA 148 (refd)
Shaari v PP [1963] MLJ 22 (refd)

[Bahasa Malaysia summary

Kedua-dua perayu telah disabitkan di Mahkamah Tinggi, Pulau Pinang atas kesalahan mengedar dadah berbahaya, iaitu candu mentah menyalahi s 39B(1)(a) Akta Dadah Berbahaya 1952 dan telah dihukum mati. Mereka telah membuat rayuan dan rayuan mereka telah didengar bersama. Di dalam rayuan itu telah dihujahkan, antara lain, bahawa: (i) hakim telah membuat kesilapan apabila memutuskan bahawa perayu mempunyai suatu kes untuk dijawab berdasarkan ujian yang ditetapkan oleh Lord Diplock dalam kes *Haw Tua Tau v PP*[7] yang hanya memerlukan penilaian yang minima terhadap keterangan pada masa kes pendakwa ditutup, untuk memastikan bahawa keterangan itu bukan sangat sukar dipercayai. Beban membukti yang terletak pada pihak pendakwa pada penutup kesnya bukanlah supaya membukti kes prima facie tetapi untuk mengemukakan keterangan yang jika tidak disangkal akan menjustifikasi sabitan tertuduh; (ii) pendakwa telah gagal membuktikan kompetens ahli kimia kerajaan oleh kerana tidak dibuktikan bahawa beliau mempunyai kepakaran atau pengalaman dalam analisa dadah berbahaya, khususnya candu; (iii) pihak pendakwa telah gagal membuktikan sehingga melebihi keraguan yang munasabah bahawa terdapat niat bersama di antara dua perayu seperti yang diperuntukkan di bawah s 34 Kanun Keseksaan (FMS Bab 45); dan (iv) hakim apabila memanggil pembelaan dimasukkan telah gagal

menarik perhatian pihak pembela kepada perkara utama dalam keterangan yang diberikan oleh pihak pendakwa terhadap mereka.

Diputuskan, menolak rayuan itu:

(1) (Oleh **Abdul Hamid Omar KHN**) Adalah jelas bahawa keterangan ahli kimia mengenai identiti dan berat dadah itu adalah keterangan mengenai fakta dan bukan keterangan pendapat mengikut maksud s 45 Akta Keterangan 1950. Soalan mengenai pengemukaan keterangan untuk menunjukkan kepakaran ahli kimia itu tidak timbul. Tetapi kepakaran dan pengalaman seseorang saksi pakar mesti dikemukakan di mana keterangan itu terdiri daripada bukan sahaja pemerhatian fakta secara langsung tetapi juga pendapat.

(2) (Oleh **Edgar Joseph Jr HMA**) Tugas mahkamah pada penutup kes pendakwa adalah untuk melakukan bukan hanya suatu penilaian minima terhadap keterangan yang dikemukakan oleh pihak pendakwa untuk menentukan sama ada keterangan pihak pendakwa itu sememangnya tidak boleh dipercayai, iaitu ujian *Haw Tua Tau*, tetapi suatu penilaian maksima keterangan itu untuk menentukan sama ada pihak pendakwa telah membuktikan tuduhan terhadap tertuduh sehingga melebihi keraguan yang munasabah.

(3) Sungguhpun hakim telah menggunakan ujian yang salah apabila memanggil pembelaan dimasukkan, kesilapan itu tidak penting dan tidak menjadikan sabitan itu tidak sah, kerana seandainya beliau memakai ujian yang lebih ketat itu, keputusannya sama juga memandangkan sifat kes pendakwa yang begitu berat (overwhelming). Tidak terdapat ketidakadilan substansial yang berlaku dan mahkamah memakai proviso kepada s 60 Akta Mahkamah Kehakiman 1964.

(4) Terdapat keterangan yang lebih daripada mencukupi di dalam kes ini untuk membuat kesimpulan yang tunggal dan tidak boleh dielakkan berdasarkan fakta bahawa terdapat niat bersama antara perayu untuk melakukan kesalahan yang dituduh iaitu kesalahan mengedar candu mentah dan bahawa mereka telah melakukan kesalahan itu dalam melaksanakan niat bersama itu.

(5) Perayu telah diwakili oleh peguambela yang berpengalaman dan tidak seorang daripada peguambela itu telah memohon kepada mahkamah untuk menyatakan sebab mengapa pembelaan dipanggil dan tidak terdapat sebarang kesan bahawa perayu telah mengalami kemudaratan disebabkan kegagalan hakim untuk menerangkan perkara utama dalam keterangan pihak pendakwa terhadap perayu.]

Notes

For cases on qualifications of expert witnesses, see 7 *Mallal's Digest* (4th Ed) paras 760–761, 765.

For cases on procedure at the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed) paras 2551, 2577–2590, 2617, 2748–2749, 2760–2761.

Complete list of cases referred to

1 *The Torenia* [1983] 2 Lloyd's Rep 210
2 *Rooker v Rooker* 164 ER 1379
3 *PP v Ang Soon Huat* [1991] 1 MLJ 1
4 *State of Gujarat v Shantaben* AIR 1964 Gujarat 136
5 *Munusamy v PP* [1987] 1 MLJ 492
6 *PP v Lam San* [1991] 3 MLJ 426
7 *Haw Tua Tau v PP* [1981] 2 MLJ 49
8 *PP v Lee Yee Heng* [1938] MLJ 117
9 *PP v Goo Kian* [1939] MLJ 291
10 *Chin Yoke v PP* [1940] MLJ 47
11 *PP v Jessa Singh* [1940] MLJ 56
12 *PP v Fong Ah Tong & Cheong Chi Shen* [1940] MLJ 240
13 *PP v Lim Teong Seng & Ors* [1946] MLJ 108
14 *Hoh Keh Peng v PP* [1948] MLJ 3
15 *PP v Annuar bin Ali* [1948] MLJ 38
16 *PP v Lam Kim Pau & Ors* [1948] MLJ 116
17 *PP v R Balasubramaniam* [1948] MLJ 119
18 *Mohamed Yatin bin Abu Bakar v PP* [1950] MLJ 57
19 *Soo Sing & Ors v PP* [1951] MLJ 143
20 *V Daniel v PP* [1956] MLJ 186
21 *PP v Lee Ee Teong* [1953] MLJ 244
22 *Wong Yiap Long & Anor v PP* [1955] MLJ 132
23 *Mohamed Kassim v R* [1956] MLJ 212
24 *PP v Saimin & Ors* [1971] 2 MLJ 16
25 *Ong Kiang Kek v PP* [1970] 2 MLJ 283
26 *A Ragunathan v PR* [1982] 1 MLJ 139
27 *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217
28 *Mah Kok Cheong v R* [1953] MLJ 46
29 *R v Barker (Note)* (1975) 65 Cr App R 287
30 *R v Galbraith* 73 Cr App R 124
31 *Mahbub Shah v King-Emperor* 72 IA 148
32 *Shaari v PP* [1963] MLJ 22

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 s 37(h)
Criminal Procedure Code (FMS Cap 6) ss 173(f), 180, 190, 214
Penal Code (FMS Cap 45) s 34
Constitution of Singapore art 9(1) [Sing]
Criminal Procedure Code s 188(1) [Sing]

Appeal from: Criminal Trial No 47(58)–23–84 (High Court, Penang)

Karpal Singh (*Gurbachan Singh, Kartar Singh* and *Manjit Singh* with him) (*Karpal Singh & Co*) for the appellant in Criminal Appeal No 05–191–89. A

K Kumaraendran (*Kumar, Sitham & Co*) for the appellant in Criminal Appeal No 05–192–89.

Dato' Stanley Isaacs (*Encik Suriyadi Halim Omar* with him) (Deputy Public Prosecutors) for the respondent in Criminal Appeal Nos 05–191–89 and 05–192–89. B

Cur Adv Vult

Abdul Hamid Omar LP: I have had the advantage of reading the judgment of the court issued by my learned brother, Edgar Joseph Jr SCJ, who in that judgment clearly sets out the brief facts of the case relevant for the purpose of this appeal. I am entirely in agreement with the views expressed by him on the question of what constitutes a prima facie case. There is, however, one other question of law raised by Encik Karpal Singh, counsel for the appellant, namely, that of expert evidence of the chemist. C D

It is argued by Encik Karpal Singh that:

(a) the chemist's evidence should not be accepted on its face value; and
(b) the evidence on the expertise of the chemist should come first, meaning that there should be evidence before the court to show the chemist's competency to give evidence as an expert. E

It is appropriate at the outset to determine whether the evidence of a chemist on the identity of a drug constitutes evidence of fact or opinion and to consider the attendant issue governing the admissibility of such evidence. If the chemist's evidence is factual, then it follows that he is competent to give evidence like any other witness and, by the same token, the law on the admissibility of such evidence would apply. If the chemist's evidence constitutes an opinion, then his evidence would come under the category of expert evidence. In that case, the question of his competency to give expert evidence arises. The law seems clear that opinion of experts are, under certain conditions, admissible in evidence. Our law of expert evidence is to be found in s 45 of the Evidence Act 1950 which explains who experts are. (See also ss 46–51.) In this regard, it is pertinent to cite what Hobhouse J said on expert evidence in *The Torenia*[1] at p 233 as follows: F G

> The question therefore becomes a question whether or not the evidence which it is sought to adduce is to be categorized as expert evidence. H
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> In a case of this kind one can analyse the matter in this way: First, evidence is adduced which can be described as direct factual evidence, which bears directly on the facts of the case. Second, there is opinion evidence which is given with regard to those facts as they have been proved, and then, thirdly, there is evidence which might be described as factual, which is used to support or contradict the opinion evidence. This is evidence which is commonly given by experts, because in giving their expert evidence they rely upon their expertise and their experience, and they do refer to that experience in their evidence. So an expert may say what he has observed in other cases and what they have taught him for the evaluation of the facts of the particular case. So also experts given I

A evidence about experiments which they have carried out in the past or which they have carried out for the purpose of their evidence in the particular case in question.

As can be seen, the delineation between the categories of evidence, namely, that of fact and opinion, is a fine one. *Phipson on Evidence* (14th Ed) has B described it as follows at pp 805–806:

> There is an important if elusive distinction to be made in the categorization of expert evidence. It is generally accepted that there is a difference between evidence of fact and evidence of opinion, notwithstanding that it may be difficult to identify the line which divides the two. It is also well understood that in practice a witness of fact may not be able entirely to disentangle his perceptions C from the inferences he has drawn from them. Although the courts often talk of 'expert evidence' as if it were a single category, representing in every case an exception to the rule against the reception of opinion evidence, it is suggested that a similar distinction exists in the evidence of experts, and it is one which has considerable relevance both to the procedural aspects and to the assessment of the weight of expert evidence. Expert witnesses have the advantage of a particular D skill or training. This not only enables them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. The latter might simply be described as 'scientific evidence', the former as 'expert evidence of opinion'. A microbiologist who looks through a microscope and identifies a microbe is perceiving a fact no less than the bank clerk who sees an armed robbery committed. The only difference is that E the former can use a particular instrument and can ascribe objective significance to the data he perceives. The question of subjective assessment and interpretation which is the essence of opinion evidence hardly enters into the matter at all.

It is to be observed that the task of the chemist is to identify the nature of the drug and, as held in *Rooker v Rooker*[2] at p 1380 that 'identification is a F question of fact, to be proved, like any other conclusion of fact, either by direct or circumstantial evidence'.

In identifying a drug, a chemist conducts various tests and the result of the tests conducted by him will reveal the nature of the drug. In the process, he identifies the drug by direct observation of the result of the experiments and, by the same token, he ascertains its weight by using scientific methods. G In this respect, AB Wilkinson in *The Scottish Law of Evidence* at p 63 says that 'where the identification is by experts using scientific criteria, the opinion is nearly always based on impression and not on conscious reflection on data'. Viewed in that light, the chemist's conclusion is clearly based on objective observation of facts as immediately perceived by him. The question H of subjective assessment and interpretation of the nature of the drug analysed does not come into play at all for the simple reason that it is not based on any opinion.

Be that as it may, we hasten to add that a chemist's evidence may be impugned by adducing evidence to show that his findings are not valid scientifically as was successfully done by the accused in *PP v Ang Soon* I *Huat.*[3]

In the premises, it is clear that the evidence of the chemist on the identity and weight of the drug constitutes evidence of fact and not of opinion. (See also the case of *State of Gujarat v Shantaben*[4] at p 138.) The chemist's

evidence on the identity of the drug is factual evidence and not opinion evidence within the meaning of s 45 of the Evidence Act 1950. Such evidence is therefore admissible in a court of law either given by him orally like any other witness or, as is specially provided by law, can be set out in a report admissible pursuant to and in accordance with s 399 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). At the risk of repetition, we would say that in our judgment, the question of adducing evidence to show the expertise of the chemist does not arise.

On the question of the acceptance of the chemist's evidence on its face value, we see no reason to depart from the decision in *Munusamy v PP*[5] where it was stated that a chemist in drug cases merely reports the result of the chemical examination of the substance. We would however qualify that by saying that although in that case the chemist who gave evidence had been in the chemistry department for 12 years and possessed a BSc degree in chemistry and biology and had given expert evidence in court, and such evidence had been accepted in the High Court in drug cases, it is our view that there was no necessity to show that he had given evidence in court and that such evidence had been accepted in the High Court in drug cases since the acceptance of his evidence was done on the basis that such evidence was factual. What was really required for the prosecution to show for the admission of the chemist's evidence on the identity of the drug was merely to adduce evidence as to his qualification in the field of chemistry and that he was a chemist in the employment of any Government in the Federation and had examined or analysed the drugs. His evidence may then be given orally or be set out in a report made by him to be admitted under s 399 of the Code. In considering further the question of the acceptance of the evidence of the chemist on its face value, we would also affirm that part of the judgment in *Munusamy v PP*[5] as cited by Hashim Yeop Sani CJ (Malaya), as he then was, in *PP v Lam San*[6] at p 428 as follows:

> As to how a trial court should approach the evidence of a chemist, we wish to advert to the judgment of this court in *Munusamy v PP* where in a passage at p 496F, Mohamed Azmi SCJ on behalf of the court put in focus the function of the chemist in a trial of this nature:
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> > 'We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.'
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> Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.

In the ultimate analysis, it is our considered judgment that the need to establish the expertise of the factual witness does not arise. However,

A expertise and qualification of an expert witness must be established where the evidence consists of not only direct factual observation but of opinion.

Edgar Joseph Jr SCJ: These two appellants, Khoo Hi Chiang and Lee Shui Hooi, were convicted in the High Court at Penang for trafficking in a B dangerous drug, to wit, 42.23kg of raw opium, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (Rev 1980) ('the Act') and sentenced to death. Their appeals were argued together since the transaction which gave rise to their prosecution was one and the same, not to mention the consideration of convenience and indeed, this was a course which C commended itself to the parties.

The appellants had been charged with and tried upon the following charge:

> That you on 10 September 1983 between 5.10pm and 6.10pm along a road in front of Telok Air Tawar Police Station, Butterworth and Jalan Taman Sri D Rambai, in the district of Bukit Mertajam, in the state of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in a dangerous drug, to wit, 42.23kg of raw opium, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 (Rev 1980) and that you have thereby committed an offence punishable under s 39B(2) of the same Act, read with s 34 of the Penal Code.

E The appeal was argued before us mainly on points of law and, in consequence, the facts of the case need only be dealt with briefly.

At the close of the case for the prosecution, the trial judge (Wan Adnan J) was of the opinion, that there was some evidence (not inherently incredible) which, if he were to accept as correct, would establish each essential F element of the alleged offence, and so he ruled, in accordance with the principles enunciated by Lord Diplock in the Singapore Privy Council case of *Haw Tua Tau v PP*,[7] that there was a case to answer in respect of both the appellants.

In his reasons for ruling as aforesaid, the judge said, by way of preliminary, that he had viewed the motor car BAP 1330 ('the car') which the appellant G Khoo was driving on the date and at the time and place specified in the charge and in which the appellant Lee, the registered owner thereof, was travelling as the sole passenger until he disembarked at the Butterworth Railway Station. It was from the petrol tank of this car that the police had recovered the opium the subject matter of the charge being exhs P9A–R, H the car having been stopped by the police as a result of information received. The judge was careful to inspect the petrol tank from the boot as well as from the inside of the car. As a result, the judge noted welding marks on both sides of the tank as shown in the photographs P11B, C and D and a partition in the tank as shown in photograph P11F. He put his hand in the I tank and touched the partition, which divided the tank into two compartments. The position of the partition corresponded with the position of the welding marks.

The judge also noted a hole in the tank as shown in the photographs P11E and F, which was covered by the screwed flap, exh P12, and that

there was a board in the boot to cover the tank as shown in the photograph P11H. A

Upon the results of his inspection of the petrol tank, the judge had no difficulty in concluding that the tank had been modified so as to create a special compartment for the purpose of concealing the opium. But not content with the obvious inferences to be drawn from an inspection of the petrol tank the prosecution had gone further and called one Abdul Rahman bin Hj Lat, a motor technician, who was familiar with Toyota cars, to testify as an expert and his evidence was to the effect that the tank had been modified to the extent that the capacity of the tank to carry petrol had been reduced to 1/5. B

The government chemist, Mr Ng Hock Seng, said that he had been attached to the Department of Chemistry, Penang, for more than ten years, held a BSc (Hons) degree conferred by the University of Malaya and had testified in courts before. He confirmed that the 18 packages found in the petrol tank of the car contained a total of 42.23kg of raw opium, being exhs P9A–R. He added that he had re-examined and re-analysed the contents of the 18 packages, found each of them to contain raw opium as defined in s 2 of the Act, and that he had prepared a report (P7) wherein his findings were recorded. C D

Explaining his conclusions he said this:

> From my second examination and analysis confirm that the raw opium was obtained from Papaver Somniferum L. From literature I have not come across any report or article stating that raw opium of commercial quantity was obtained from species Papaver Setigerum DC. Raw opium is obtained in commercial quantities from Papaver Somniferum L. I would say that 42.23kg is in commercial quantities. E

He was not cross-examined as to his competence to testify as an expert on the examination and analysis of dangerous drugs and, indeed, counsel for the appellant Khoo did not ask him a single question in cross-examination while counsel for the appellant Lee asked him only one question regarding the street value of the raw opium seized, to which he replied that he did not know. F

There was an unbroken chain of evidence as to the opium, the subject of the charge, from the time it was seized until its production in court, and indeed, there was no complaint made by the defence on this score, either in the court below or here. G

Having regard to the fact that at the material time, the appellant Khoo was driving the car and that the appellant Lee, the registered owner of the car, was travelling as a passenger, and that there was no one else in the car, the judge invoked the presumption under s 37(h) of the Act which reads: H

> ... if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being; ... I

The judge also found as a fact that soon after the car was stopped by the police at the scene, the opium was discovered in the tank as a result of information given to the police by the appellant Khoo, who it will be

A recalled, was the driver of the car, which evidence he held was clearly admissible under s 27 of the Evidence Act 1950 (Rev 1974), notwithstanding objection by counsel for the appellant Khoo.

Recounting the events which led to the discovery of the opium, the judge noted that Insp Hussein bin Othman (PW2) had conducted a thorough search of the car at the Balai Polis, Bukit Mertajam soon after it was B stopped, in the presence of the appellant Khoo and Sgt Koh Kim Hock (PW3).

The judge further noted that when Insp Hussein had removed the rear seat of the car, he smelt what he thought was opium. So he attempted to trace the source of that smell but failed and it was at that point of time that C he was told by the appellant Khoo that the opium was in the petrol tank. This caused Insp Hussein to open the cover of the petrol tank with the aid of a screw driver and it was in the petrol tank that he discovered the is packages which contained the opium, the subject matter of the charge.

The defence having been called, both the appellants elected to make their defence from the witness box and, as it turned out, each was in fact D passing the buck to the other.

The appellant Lee's version was that on 4 September 1983, he had gone to Haadyai in Thailand, where he stayed with his girlfriend and that during his stay there, he had quite coincidentally met the appellant Lee, whom he had known for about three or four years previously. In the course of E conversation, the appellant Khoo told the appellant Lee that he would be returning to Malaysia on 9 December 1983, whereupon the appellant Lee, who had with him the car, offered him a lift back home on 10 September 1983, an offer which the appellant Khoo readily accepted.

Accordingly, on the morning of 10 September 1983, both the appellants had proceeded in the car bound for Butterworth via Changloon, with the F appellant Lee at the wheel. On the way, at Alor Setar, the brake of the car was in need of repair. This was duly attended to and the repairs paid for by the appellant Khoo, on the understanding that he would be reimbursed later by the appellant Lee.

Continuing their journey, on arrival at Gurun, they had stopped for G refreshments. But because the appellant Lee had consumed liquor at Gurun and was tired, they had resumed the journey with the appellant Khoo at the wheel.

On arrival at the Butterworth Railway Station, the appellant Khoo had stopped to look for a friend who was operating a pirate taxi so that he could ask the friend for a lift home, but had failed to trace him. So, the appellant H Khoo asked the appellant Lee for a lift home. However, the appellant Lee suggested that the appellant Khoo drive the car home and return it the next morning — a suggestion with which the appellant Khoo agreed. So the appellant Lee alighted from the car, taking along with him his belongings. The appellant Khoo then drove the car to Bukit Mertajam, but, on arrival I at a junction there, he was stopped by the police. He denied all knowledge of the opium found in the petrol tank of the car.

Under cross-examination by counsel for the appellant Lee, the appellant Khoo denied that the car was his; in particular, he denied that he had had it registered in the name of the appellant Lee for convenience because he

feared income tax enquiries. However, he admitted that the appellant Lee had asked him to look for a car and had handed him RM2,300 to pay for it and that was how he came to pay for the car. He maintained, however, that it was the appellant Lee who had used the car.

The appellant Lee's version was materially different from that of the appellant Khoo. According to the appellant Lee, on 17 September 1983, he had received a telephone call from Haadyai from the appellant Khoo, requesting that he bring the car to Haadyai, and that was why he had driven the car to Haadyai on 8 September 1983 and there met the appellant Khoo at the Wat Noi Hotel. After dinner, the car was driven away by the appellant Khoo who was alone in the car. On the next day, 9 September 1983, the car was also with the appellant Khoo.

On 10 September 1983, they had both left for Malaysia with the appellant Khoo at the wheel.

On arrival at Alor Setar, the car required repairs and it was the appellant Khoo who paid for this. Continuing their journey, on arrival at Kepala Batas, the appellant Khoo paid for petrol. Then, on arrival at the Butterworth Railway Station, the appellant Lee alighted. However, the appellant Khoo had told him that he (the appellant Khoo) would be going to Kuala Lumpur for a few days, so he caught a taxi but, on arrival at the end of Jelutong Road, he was arrested by the police.

As for the car, the appellant Lee said that in fact it had been purchased by the appellant Khoo but registered in his name for convenience only because the appellant Khoo was afraid of income tax queries. He pointed out that he had a car of his own at the material time. He denied that he had handed the appellant Khoo RM2,300 to pay for the car. He explained that the car had been kept at his house because the appellant Khoo had no place of his own to park the car. He too denied all knowledge of the presence of the opium in the car.

Having recounted the evidence both for the prosecution and the defence, the judge made the following findings:

> I find that both the first and second accused were working together to traffick the drugs. The joint effort started with the purchase of the car, BAP 1330. At the time of purchase, each of them already had a car of his own. Yet they bought an old car at the price of RM4,300. That was on 4 May 1983. The car was seldom used until 18 September 1983 when the second accused drove it to Haadyai. I also find that the meeting in Haadyai was not a chance meeting but a pre-arranged one. I also find that the petrol tank of the car was modified to create the special compartment after the purchase of the car from PW12. I believed PW12 and the previous owner, PW9, that when the car was with them the tank had not been modified. I also believed PW2 that he discovered the drugs in the tank as a result of information given by the first accused. At the time of arrest, two plastic containers, P5A and B, were found in the boot of the car. They were filled with premium petrol. There was also found a funnel, P30. I find that these were carried because the capacity of the petrol tank had been so much reduced that it was necessary to fill up the tank often. I also find that the second accused was the owner of the car and that the first accused was the person having the charge of the car.

A He then arrived at the following conclusions:

> On the balance of probabilities, they had failed to rebut the presumption under s 37(h) of the Act. I find their stories far-fetched and improbable. I find that they had failed to raise any doubt as to the truth of the prosecution's case or as to their guilt. I have no doubt that they are guilty of the offence charged. I convicted them and sentenced them to death.

B

Before us the convictions were attacked on a number of grounds.

The principal points of law argued were twofold: firstly, that in ruling that the appellants had a case to answer, the judge had relied on the test laid down by Lord Diplock in *Haw Tua Tau*[7] which requires only a minimal C evaluation of the evidence at the close of the case for the prosecution to ensure that it is not inherently incredible. It was said he was wrong in so doing as the onus on the prosecution at the close of its case was *not* to establish a *prima facie case*, but to tender evidence, which if unrebutted, *would* warrant a conviction. (See s 180 of the Code.)

Secondly, that the prosecution had failed to establish the competence of D the government chemist, Mr Ng Hock Seng, as he had merely testified that he was a government chemist attached to the Department of Chemistry, Penang, for more than ten years, that he held a bachelor of science degree with honours conferred by the University of Malaya and had testified in courts before. It was said that this was not sufficient to show that Mr Ng E had the expertise or experience in the relevant field, namely, the analysis of dangerous drugs within the meaning of the Act, in particular, raw opium.

We must add that the appeal was also argued, generally, on the facts and merits which gave rise to at least three other points of law, which we shall be considering in the course of this judgment but, first of all, we must direct our attention to the first of the two principal points of law aforesaid.

F By way of preliminary, we wish to point out that the relevant sections which govern the procedure at the close of the case for the prosecution in the subordinate courts, in the High Court before a judge sitting alone and before a judge sitting with the aid of assessors, are ss 173(f), 180 and 190 of the Code, respectively, which are in pari materia and read as follows:

G

Of Summary Trials by Magistrates

> 173(f) If upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted *would* warrant his conviction the Court shall record an order of acquittal.

H Trials before a judge alone — s 180:

> When the case for the prosecution is concluded, the Court, if it finds that no case against the accused has been made out which if unrebutted *would* warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence. (Emphasis added.)

I In trials before a judge and assessors, the procedure stated in s 190 is the same as for trials before a judge alone.

In the case of a trial in the High Court before a judge sitting with a jury, the relevant section which governs the procedure at the close of the case for the prosecution is s 124 which reads as follows:

(i) When the case for the prosecution is concluded the Court, if it considers that there is *no evidence* that the accused committed the offence, shall direct the jury to return a verdict of not guilty.

(ii) If the Court considers that *there is evidence* that the accused committed the offence the Court shall call on the accused to enter on his defence.

(iii) The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they *could not* safely convict. (Emphasis added.)

The language of s 180 of the Code is not new; it is the same language under which our courts have been accustomed to act when they decide, at the close of the case for the prosecution, to either acquit and discharge an accused or to call upon him to enter upon his defence.

Until the decision of the Privy Council in the Singaporean case of *Haw Tua Tau v PP*,[7] there had been a consistent current of judicial opinion in this country that at the close of the case for the prosecution, the onus imposed upon the prosecution by s 180 of the Code (and, in the same way, by ss 173(f) and s 190), was to tender evidence which, if unrebutted, would warrant a conviction and that only evidence beyond all reasonable doubt was of that nature.

The authorities which we shall be considering in a moment concern trials in the subordinate court as well as trials in the High Court before a judge either sitting alone or with the aid of assessors.

In *PP v Lee Yee Heng*,[8] the accused, a clerk in charge of the government chandu shop in Ampang, Selangor, was tried on a charge of abetment of possession of chandu by another person. At the conclusion of the prosecution's evidence, counsel for the defence had submitted that there was no case to answer. The trial magistrate ruled that there was a case to answer. The accused gave no evidence and called no witnesses. The magistrate then reserved judgment until the following day. On that day, counsel for the defence asked the magistrate that the accused be required to state for himself, whether he wished to make any defence. The usual warning was given to the accused who elected to remain silent. The court thereupon made the following finding that 'from the evidence produced before the court, I find that it is not strong enough to record a conviction although it is highly suspicious against the accused. I accordingly acquit the accused.'

The public prosecutor appealed from the acquittal and Cussen J allowed the appeal. The judge pointed out that when the magistrate overruled the submission of no case to answer and called upon the defence, it must be taken that the magistrate had considered that a case had been made out which, if unrebutted, warranted his conviction. In view of the defence being called upon, the magistrate must then, said the judge, under s 173(h) of the Code, have been of opinion that there were grounds for presuming that the accused had committed the offence charged. When no defence was offered

A it might have been expected that the magistrate would then and there have convicted the accused. However, he in fact acquitted the accused. This is how Cussen J put it:

> Now in the first place it may be that, although at the close of the prosecution case, the magistrate was of opinion that a case, as required by s 173(f) of the
B Criminal Procedure Code, has been made out and so rightly called upon the defence, yet having reserved judgment until the next day he on further consideration concluded that his first opinion was wrong, and decided that a case under s 173(f) had not been made out. That, though perhaps unusual, is in no way improper, although the correct procedure, if the magistrate felt in any way doubtful and in need of consideration at the close of the prosecution case, was,
C after hearing the submission and argument thereon of counsel, to have then taken time to consider and decide whether or not a case had been made out against the accused.
>
> But, on the next day of the trial, it must be considered that the magistrate had, on consideration overnight, decided that there was not a case, and that the evidence of the prosecution did not establish anything more than a case of grave
D suspicion. But if that was so he should have so recorded it and acquitted the accused, without again calling upon him to answer the charge.
>
> It is difficult to understand the logic or lack of logic which dictated these proceedings.
>
> But, while I do not say that it is what happened, although what I have recounted above of the proceedings might very well suggest it, I would like to
E state that it is wrong and contrary to the provisions of the Criminal Procedure Code for a magistrate, if at the close of the prosecution case he in fact considers that only a highly suspicious case has been made out against the accused, to proceed to call upon the defence in the possible hope that the defence, if one is made, may resolve his doubts.
>
> Without examining in detail the evidence given for the prosecution in this
F case I have no doubt whatever that this was a case which strongly warranted a conviction if unrebutted and that the accused should have been convicted. There is no suggestion that any of the evidence given by the prosecution witnesses was not believed by the court. In his grounds of judgment what the learned magistrate finds is that the evidence, even if fully accepted, is not sufficient to establish more than a case of suspicion. Since, therefore, the credibility of the witnesses is not
G in question, which is peculiarly a matter for the trial court, I am free to reverse the decision of the lower court.

In *PP v Goo Kian*,[9] the public prosecutor had appealed against the acquittal of the respondent on a charge of theft. Raja Musa J said that at the close of the prosecution's case the evidence disclosed that the respondent took the complainant's bicycle which undoubtedly was in the complainant's
H possession, out of his possession by riding it away to Seremban, without the complainant's consent and by such taking he, without doubt, prima facie caused wrongful loss to the complainant in that he was deprived, without his consent, of the use of his own bicycle. In the words of the judge:

> The position therefore was that the prosecution had disclosed a prima facie case
I which, if unrebutted, would have warranted the respondent's conviction.
>
> The respondent should therefore have been called on his defence. It was open to him to rebut the inference as to his intent and the court would then have been in a position to apply the law. In this case however the learned magistrate appears

to have anticipated the defence without calling upon it. I consider that that was irregular.

With the learned magistrate's exposition of the law I have no reason to quarrel but he must have all the facts before him before he can apply the law. For instance illustration (m), upon which the learned magistrate relied, opens with the words 'A, being on friendly terms with Z'. There must be evidence of such friendly relationship. Here there was no such evidence at all.

In *Chin Yoke v PP*,[10] Gordon Smith Ag JA pointed out at p 48 col 2 para 2, that a magistrate is in the same position as a judge in the exercise of the powers conferred by ss 173(f), 180 and 190 of the Code, respectively, the wording of all these provisions being identical. He went on to add, however, that in the case of a trial with a jury, the matter was slightly different, the relevant section being differently worded. And, further down at p 48 col 2 para 5 his Lordship added this:

This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence.

In *PP v Jessa Singh*,[11] the respondent was charged with theft. It was proved that the respondent had removed the metals, the subject of the charge, without permission but the magistrate acquitted him.

Murray-Aynsley CJ said:

In this case the magistrate acquitted the respondent at the close of the case for the prosecution. I think he acted prematurely. There was evidence which if unrebutted would have justified a conviction. When the respondent has been heard it is quite possible that a satisfactory explanation may be given; but it is not part of the duty of a court at an early stage in the proceedings to anticipate possible defences, and then to act as though those defences had been established.

In *PP v Fong Ah Tong & Cheong Chi Shen*,[12] a murder trial before a judge with assessors, a submission of no case to answer had been made by counsel for the defence under s 190 of the Code and, in the course of his ruling thereon, Laville J said this at p 240 paras 3 and 4:

But by s 190 it would appear that there is an onus cast on the presiding judge at a trial with the aid of assessors to decide at the end of the prosecution evidence, not as in jury cases whether there is any evidence at all of the guilt of the accused, to go to the jury, but a greater onus, namely, whether the prosecution evidence, if no evidence is given at all by accused would justify a conviction. Warrant in my view is a strong word and excludes any doubts by the court.

The evidence which would warrant a conviction, if unrebutted, is evidence that satisfies the court beyond all reasonable doubt that the accused is guilty of the offence charged or some lesser offence. The criterion therefore on which the

court must work is, if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt.

Fong Ah Tong[12] appears to be the only locally reported case where the word 'warrant' in the context of s 190 had received judicial consideration.

In *PP v Lim Teong Seng & Ors*,[13] Laville J when exercising original criminal jurisdiction, said this at p 109 col 1 para 4 to col 2 para 1:

> I have considered the sections that cover procedure at the end of the prosecution evidence in the magistrate's court, in the court of a judge sitting alone, and also sitting with assessors, and in the court of a judge sitting with a jury. The relevant sections are respectively ss 173(f), 180, 190 and 214 of the Criminal Procedure Code. The wording in the first three cited sections is the same; the meaning to be applied to it cannot be differentiated.
>
> In my view, the basis of this direction in ss 173(f), 180 and 190 is twofold. Firstly, that the onus is on the prosecution and never shifts to prove its case. Secondly, that the circumstances of each of these three forms of trial are the same. The presiding officer is sitting not only as a judge but as a jury. If therefore at the close of the prosecution he as a jury comes to the conclusion, not that there is no evidence, but that the evidence produced is not strong enough to warrant a conviction, and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: 'I am doubtful of this evidence but let us see if it can be supplemented and improved by what can be elicited from the defence.' The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction if any must rest, even if accused calls evidence. What the prosecution can elicit for its view from them is either supplementary or redundant, or goes to lessen the credibility of the defence evidence. It cannot be the basis of a conviction. If therefore at the close of the prosecution the court is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused. This view point is set out by the sections cited above.

In *Hoh Keh Peng v PP*,[14] a Court of Appeal decision, Spenser-Wilkinson J speaking for the court, said, inter alia, this (at p 4 col 2 para 3):

> ... Unless at the close of the case for the prosecution the offence has been made out, there is no justification for calling upon the accused for any explanation whatever. There is a positive duty upon the judge under s 180 of the Criminal Procedure Code to acquit the accused at the close of the prosecution if he is not prepared then and there to convict without hearing more. If an accused person is called upon for his defence he may be able to turn the balance in his favour; but he should never be called upon for his defence in a case of doubt so that he may convict himself by supplementing a weak prosecution case.

In *PP v Annuar bin Ali*,[15] Spenser-Wilkinson J, when exercising original criminal jurisdiction, considered the duty of a judge sitting alone, at the close of the case for the prosecution in these terms (at p 39 col 1 para 2):

> ... When a judge is sitting alone, it is easy for him to reach this finding, because he is the sole judge of law and of fact, and he is the person who has to be satisfied beyond a reasonable doubt of the accused's guilt and must know at that stage whether or not he has believed the witnesses; ...

Continuing, his Lordship contrasted the position of a judge sitting alone with that of a judge sitting with assessors, and then with a jury, in these terms (at p 39 col 1 paras 2 and 3 and col 2 para 1):

> ... but where the judge is sitting with the assessors, he is unable to know at the close of the case for the prosecution what view the assessors will take of the evidence which has up to that point been produced. The judge himself may not be altogether satisfied beyond all doubt, but the assessors may; unless, therefore, it is clear to the judge at the close of the case for the prosecution that the assessors could not reasonably find the accused guilty on the evidence adduced if full weight were given to it, then it seems to me that the accused must be called upon for his defence.
>
> I derive no assistance from the wording of s 214 which deals with the position when the trial is by jury. There, at the close of the case for the prosecution, the court directs a verdict of not guilty if there is no evidence that the accused committed the offence. This is strong language, and I do not think that a judge trying a case with the aid of assessors needs to go so far under s 190 as to decide that there is no evidence that the accused committed the offence. I read s 190, in its context as part of Ch XXI of the Criminal Procedure Code, as meaning that if, at the close of the case for the prosecution, the judge finds that there is insufficient evidence then before the court upon which reasonable assessors could find the accused guilty if no more is heard, then he must acquit the accused, but not otherwise. Except in exceptional circumstances, such as a principal witness being obviously unreliable, I do not think that a judge, trying a case with the aid of assessors, can properly, on a submission of 'no case', go into such questions as the weight of the evidence or the credibility of witnesses, which are matters to be dealt with by the assessors at the conclusion of the whole case.

In *PP v Lam Kim Pau & Ors*,[16] Laville J reasserted his previous view that the assessors do not form part of the court but are ancillary to it. On the procedure to be followed when a submission of no case is made, he said:

> Section 190 of the Code lays down the procedure to be followed by the judge at the close of the prosecution. It casts on him the grave onus of deciding whether the case so far made out is one which warrants a conviction, and, if he decides that it does not, he shall — the term is mandatory — record an order of acquittal.
>
> If the matter was one for the assessors or for their opinion at this stage, the legislature would have laid it down, as it has laid it down in regard to the concluding stage of the trial in s 197. But there is in s 190 complete absence of mention as to any consultation with the assessors or any recording of their opinion. It is difficult to see how the trial judge at this stage could effectively consult the assessors or ask their opinion. If he does so and their opinion is contrary to his, what is he to do? Must he ignore their opinion and go on with the trial, or in the opposite case ignore their opinion and acquit the accused? Unless he is to be guided by their opinion in some way, it seems pointless to consult them at this stage, and it is impossible to see what aid they can give him then.
>
> It is for this reason that it seems to me incumbent on the trial judge, when a submission is made under s 190 of the Criminal Procedure Code, and is, as it must be, argued on the facts disclosed in the evidence, to request the assessors to leave the court while the argument proceeds.
>
> I hold therefore that where at the end of the prosecution a submission is made that the court should act under s 190 of the Criminal Procedure Code and the submission is based on facts in issue in the trial, the assessors should not remain in court while the submission is argued.

A It is part of the duty of a judge at the conclusion of a trial to impress on the assessors that they must come to their own decision on the facts and must not be influenced by any opinion the judge may express on facts.

In deciding a submission of this nature the trial judge must necessarily disclose his opinion on the facts of the case as far as it has gone and, if the assessors are present, they would naturally tend to be influenced by that decision B in their judgment on the facts of the whole case, if it proceeds further, and for this reason they should not be in court.

In *PP v R Balasubramaniam*,[17] a prosecution for falsification of accounts in contravention of s 477A of the Penal Code (FMS Cap 45), Callow J said that in coming to a decision as to whether or not to call for the defence after C listening to a submission of no case to answer, he was guided by the case of *PP v Lim Teong Seng & Ors*,[13] but he went on to indicate that there was a *distinction* between making out *a prima facie case* and making out *a case beyond all reasonable doubt*. This is how he put it (at p 120 col 1 para 5):

The learned counsel for the Crown said a prima facie case had been made out. D He said there is a case, although it may be answerable. *I must go further and consider whether even if a prima facie case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced.* (Emphasis added).

In *Mohamed Yatin bin Abu Bakar v PP*,[18] an appeal against conviction for the offence of attempting to cheat in contravention of s 420 read with s 511 of the Penal Code (FMS Cap 45), Spenser-Wilkinson J said, inter alia, this E (at p 59 col 1 para 2):

In this country, at the close of the case for the prosecution the court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but F whether, even if the court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt.

In the Court of Appeal case of *Soo Sing & Ors v PP*,[19] a criminal reference under s 34 of the Courts Ordinance 1948, the court construed s 173(f) of the Code, as follows:

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Section 173 of the Criminal Procedure Code lays down the procedure to be followed by magistrates in summary trials. The 'evidence hereinbefore referred to' in para (f) of that section has reference only to the evidence given for the prosecution. That being so, *it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the* H *prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt.* (Emphasis added.)

And, in *V Daniel v PP*,[20] an appeal against conviction on a charge of being found in unlawful possession of scrap rubber, in contravention of reg 4(1) of the Emergency (Rubber Control) Regulations 1949, Buhagiar J said (at I p 188 col 1 para 1):

There is no doubt that Soo Sing's case put away any doubt that there may have been as to the correct interpretation of s 173(f) of the Criminal Procedure Code and even if I disagreed with that decision, and I do not, I would be *bound by it.* (Emphasis added.)

In *PP v Lee Ee Teong*,[21] an appeal by the public prosecutor against acquittal and discharge in respect of a charge of assisting in the carrying on of a public lottery in contravention of s 4(1)(c) of the Common Gaming Houses Ordinance 1953, Thomson J (as he then was) said this (at p 245 col 2 para 2):

> In the absence of any direct statutory provision to the contrary the rule is that in a criminal prosecution the onus lies on the prosecution to prove every ingredient in the offence charged against the accused person. If the prosecution fail to produce evidence which is believed and which, if unrebutted, would make out every such ingredient then the case must be dismissed without the accused person being called upon to make his defence. If he is called upon to make his defence then the court must consider the evidence as a whole and, if satisfied that every ingredient of the offence has been proved, then convict.

In *Wong Yiap Long & Anor v PP*,[22] the appellant had been convicted on charges of assisting in the management of a place used as a common betting house. The appeal was allowed in the High Court. Abbott J said:

> The only point for determination is as to whether or not the prosecution had made out a prima facie case before the defence was called upon. Before the prosecution closed its case, the senior police officer merely stated that he led the raid acting upon information which had been given to him by some person, orally in the street. Sections 12, 13 and 14 [of the Betting Ordinance1953] empower the search of premises and the granting of search warrants by magistrates, justices of the peace and senior police officers. Section 14(1)(d) enables premises to be searched without ... [delay] ... where the object of the search would be defeated by delay. The senior police officer himself did not testify as to whether or not such delay would have defeated the ends of justice, nor did he give any reason as to why the information was not reduced to writing. At the close of the prosecution case, therefore, the evidence was incomplete and no prima facie case had been made out.

In *Mohamed Kassim v R*,[23] an appeal against conviction in respect of a charge causing death by a rash act by driving a car, Spenser-Wilkinson J said (at p 213 col 2 para 2):

> Be that as it may, it is clear from the passages quoted from the learned President's grounds of decision that at the close of the prosecution case he was inclined to believe the prosecution case as deposed to by the sixth and seventh witnesses. How strong this inclination was it is difficult to tell, but *unless the learned President was satisfied beyond a reasonable doubt that these facts had been proved he should not have called upon the accused for his defence.* In my opinion in view of the provisions of s 182(f) of the Criminal Procedure Code the court is *bound at the conclusion of the case for the prosecution to decide definitely which, if either, of two possible but incompatible versions of the facts has been proved.*
>
> If the learned President in stating that he was inclined to believe the story of the sixth and seventh witnesses meant that the prosecution had made out their case on that evidence then it is clear from the rest of his grounds of decis ion that the defence subsequently raised more than a reasonable doubt as to this version and the accused should, therefore, have been acquitted. If, on the other hand, he meant that he could not decide at the close of the prosecution case which version was the true one then the prosecution had not made out their case and the accused should not have been called upon for his defence. (Emphasis added.)

In *PP v Saimin & Ors*,[24] Sharma J in quashing a conviction on a charge of theft of coconuts said this [at p 17]:

> If the learned magistrate was not satisfied with the case for the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt ...
>
> As the learned magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.

In *Ong Kiang Kek v PP*,[25] a decision of the Singapore Court of Appeal, an appeal against conviction on a charge of murder in contravention of s 302 of the Penal Code, Wee Chong Jin CJ speaking for the court (at p 284 col 2 paras C–I) said:

> In fact the law imposes a duty on the court, whether or not a submission of no case to answer has been made, to consider at the close of the case for the prosecution whether or not a case has been made out against the accused which if unrebutted would warrant his conviction. Section 177C of the Criminal Procedure Code reads:
>
> '177C When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.'
>
> Section 172 which prescribes the procedure to be observed by magistrates' courts and district courts in summary trials contains a para (f), which is similar in terms to s 177C. It is *settled law that under s 172(f) a magistrates' court or a district court is bound to acquit an accused person if, at the close of the case for the prosecution, the court on the evidence then before it has a reasonable doubt as to the guilt of the accused of the offence charged.* The reason is because in a criminal case it is a cardinal principle that the burden is on the prosecution to prove the case against the accused beyond a reasonable doubt and accordingly *no conviction can be warranted unless at the close of the case for the prosecution the court is left in no reasonable doubt as to the guilt of the accused.*
>
> It has been held that a judge (of the High Court) sitting without a jury, where the relevant section is in pari materia with our s 177C and s 172(f), must acquit the accused if, at the close of the case for the prosecution, the court is of the opinion that on the prosecution evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt. (*PP v Lim Teong Seng & Ors.*) We are of the same opinion and are of the view that the trial court is required by s 177C, at the close of the case for the prosecution, to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused. (Emphasis added.)

Before proceeding to consider the Privy Council case of *Haw Tua Tau*,[7] we would make the preliminary observation that the expression 'a prima facie case' is nowhere to be found in the Code.

Now, what is meant by the expression 'prima facie case'? A

That phrase is not self-explanatory and indeed is ambiguous. What is it that the case shows prima facie or at first sight?

Nevertheless, the expression 'prima facie case' has been regularly used by our courts; see, for example, *PP v Lee Yee Heng*[8] (per Cussen J at p 118); *Chin Yoke v PP*[10] (per Gordon Smith Ag JA at p 49); *PP v R Balasubramaniam*[17] (per Callow J at p 120); *Wong Yiap Long & Anor v PP*[22] (per Abbott J at p 133) and *PP v Saimin & Ors*[24] (per Sharma J at p 17). A reading of the judgments in these cases suggests that there is a difference of judicial opinion as to what constitutes a prima facie case. B

More particularly, in *R Balasubramaniam*,[17] Callow J drew a sharp distinction between a prima facie case and a case beyond reasonable doubt whereas neither Gordon Smith Ag JA in *Chin Yoke*[10] nor Sharma J in *Saimin*[24] did anything of the sort and, indeed, they both seemed to combine the two concepts. Of the two views, that of Gordon Smith Ag JA and Sharma J, that of Gordon Smith Ag JA, with respect, seems to us much clearer as his view is that if, after weighing up the evidence for the prosecution, the court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called upon for his defence. C D

Turning to *Haw Tua Tau*'s case,[7] an appeal against conviction and sentence of death for murder recorded by two judges of the High Court following a trial held under s 193 in the reprint of the Singapore Criminal Procedure Code and later affirmed on appeal to the Court of Appeal, the only question argued before the Board was the contention that the amendments made to s 195 of the Criminal Procedure Code by Act No 10 of 1976 which abolished the previously existing right of the accused to make an unsworn statement without subjecting himself to cross-examination, was inconsistent with art 9(1) of the Constitution of Singapore, which provides that: 'No person shall be deprived of his life or personal liberty save in accordance with law', and therefore void by reason of art 4. E F

It was, therefore, strictly unnecessary for Lord Diplock, who spoke for the Board, to consider the effect of s 188(1) of the Singapore Criminal Procedure Code which reads: G

> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.

Nevertheless, his Lordship did so at some length because of certain passages in the judgment of the Court of Appeal in Singapore in *Ong Kiang Kek v PP*[25] which indicated quite clearly that, unless at the end of the case for the prosecution the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. H

What his Lordship said [at p 51 col 2 para D] was this: I

> For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced

A by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.

The crucial words in s 188(1) are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It B is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by s 188(1) the court must act on the presumptions: (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn C from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been D confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are E for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were to be accepted by the jury as accurate, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible F that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that G they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness, jurors would be instructed that it was H their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge I (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of the those essential

> elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses, until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they wish to advance.

It would appear, therefore, that the view of Lord Diplock as to the interpretation of s 188(1) was obiter dicta. Certainly, apart from *Ong Kiang Kek*'s case,[25] Lord Diplock made no mention of any of the local or Singapore cases to which we have referred, and which are to the opposite effect.

Nevertheless, in *A Ragunathan v PR*,[26] a decision of the Federal Court, the applicant had been prosecuted in the magistrates' court with an offence under s 18(1) of the Public Service Tribunal Act 1977 for making a communication to the press in regard to proceedings of the tribunal, he was acquitted and discharged without his defence being called but on appeal to the High Court the acquittal was set aside and he was required to enter upon his defence. He then applied to the High Court to refer two questions of law for the determination of the Federal Court but his application was refused, whereupon he applied to the Federal Court.

The Federal Court noted that, in essence, the questions referred to it amounted to a submission that there was no case for the applicant to answer at the close of the case of the prosecution on the ground that the prosecution had failed to adduce any evidence that the applicant was a public officer and that therefore the prosecution had failed to establish a prima facie case against him. This submission called for a consideration of s 173(f) of the Code, quoted above.

In the course of its judgment, refusing the application, the Federal Court observed that s 173(f) of the Code is similar to s 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976, which the Privy Council had interpreted in *Haw Tua Tau*,[7] and went on to reproduce the passages in the judgment of Lord Diplock which we have reproduced above. The Federal Court then proceeded to apply the principles enunciated by Lord Diplock, though without any discussion.

In particular, the Federal Court held that at the close of the case for the prosecution, the magistrate had to determine as a question of law whether, on the evidence adduced and unrebutted, the applicant *could* be lawfully convicted; that is to say, whether there was with respect to every element in the charge *some evidence*, which *if* accepted, would either prove the element directly or enable its existence to be reasonably inferred. This was a question of law to be distinguished from the question of fact for ultimate decision which was whether, on the evidence as a whole, the prosecution had proved to the satisfaction of the court, as a tribunal of fact, that the applicant was guilty as charged.

In *Munusamy v PP*,[5] a decision of the Supreme Court, an appeal against conviction on a charge of trafficking in a dangerous drug, it was a specific ground of appeal that the trial judge had erred in accepting the credibility

of witnesses for the prosecution at the close of the case for the prosecution, contrary to the principles enunciated in *Haw Tua Tau*,[7] referred to with approval in *Ragunathan*.[26]

The contention was rejected and the appeal dismissed; the court held that it was not wrong for the judge to have done so since, *conceptually speaking*, the test enunciated in the pre-*Haw Tua Tau* cases was the *same* as that enunciated in *Haw Tua Tau*[7] and that *Haw Tua Tau*[7] merely stated in different words what had earlier been said in *PP v Chin Yoke*.[4] To the same effect is the recent decision of the Supreme Court in *Junaidi bin Abdullah v PP*.[27]

With the utmost respect, we cannot agree. The *Haw Tua Tau* test requires a minimal evaluation of the evidence at the close of the prosecution's case to ensure that it is not inherently incredible whereas the test adopted in the pre-*Haw Tua Tau* cases requires a maximum evaluation of the evidence at that stage of the trial to ensure that on that evidence standing alone the court would be prepared, then and there, to convict should the accused say nothing, before the accused can be called to enter upon his defence.

It is obvious that the anchor sheet of Lord Diplock's reasoning regarding the point at issue before us was his equating the duty of the court of trial in a non-jury case, in Singapore, at the close of the case for the prosecution, as provided for under s 188(1) (equivalent to our ss 180, 190 and 173(f)) with that of a judge sitting with a jury in England. (See *Haw Tua Tau*[7] at p 51 col 2I to p 52A).

Forty years ago, Spenser-Wilkinson J in the Penang case of *Mah Kok Cheong v R*[28] had occasion to draw attention to the difference between our criminal procedure and that of England, on this very point, in the following terms:

> But whatever may be the defence to a criminal charge the sole question which a subordinate court has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case. *In this respect our criminal procedure differs from that in England and this difference makes it necessary to apply with caution the English decisions which almost all deal with trials by jury.* (Emphasis added.)

To revert to *Haw Tua Tau*,[7] Lord Diplock then went on to consider the function of the judge in a jury trial at the conclusion of the case for the prosecution; that function, according to well-established practice, requires the judge to decide for himself whether evidence had been adduced which, *if it were to be accepted by the jury as accurate*, would establish each essential element in the alleged offence, this being a *question of law*. Lord Diplock next went on to explain what the application of this test entailed when he added that if there is no evidence (or only evidence that is so inherently incredible that no reasonable person *could* accept it as being true) to prove any one or more of those essential elements, it would be the judge's duty to direct an acquittal; but if there is *some* evidence, the judge must let the case go on.

The approach to be adopted by the judge in a jury trial in England when a submission of no case to answer is made has been judicially considered in a number of reported cases. We propose to refer to two of these.

In *R v Barker (Note)*,[29] Widgery CJ said this:

> ... even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where *the necessary minimum evidence* to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury ... (Emphasis added.)

In *R v Galbraith*,[30] the court, after quoting with approval, the passage in the judgment of Widgery CJ in *R v Barker*[29] which we have reproduced above, went on to offer guidance as to the proper approach in these terms. It identified two schools of thought on the subject:

(1) that the judge should stop the case if in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; and
(2) that he should do so only if there is no evidence upon which a jury properly directed *could* properly convict.

It expressed a preference for the second of the two schools of thought.

Looking back, what all this lengthy discussion comes to is whether we can treat the words 'which if unrebutted would warrant a conviction' appearing in ss 180, 190 and 173(f) of the Code as meaning no more than 'which if unrebutted could or might warrant a conviction'.

With all due respect to Lord Diplock — and we say this humbly, even without reference to the wealth of long-standing decisions by judges in this country and in Singapore to which we have referred, and only after careful thought — that we are unable to treat the words 'which if unrebutted *would* warrant a conviction' as meaning no more than 'which if unrebutted *could* or *might* warrant a conviction'. To do so would amount to making an unauthorized amendment to a statutory provision which touches the liberty of the subject. With the support of the long-standing decisions to which we have referred, our view would be a fortiori.

It follows, therefore, that in this country, at the close of the prosecution's case, the question for decision by the trial judge, (except when he is sitting with a jury), is *not* just a hypothetical question of law but an actual and quite different question of fact illustrated by the numerous Malaysian and Singaporean cases decided before our courts were infected by the *Haw Tua Tau* virus.

Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible — the *Haw Tua Tau* test — but a *maximum evaluation* of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

With considerable regret, therefore, we must decline to follow *Haw Tua Tau*[7] and its progeny *Ragunathan*,[26] *Munusamy*[5] and *Junaidi*,[27] as to the effect of the relevant statutory provisions of the Code to which we have referred and discussed.

True it is that the judge was wrong in having applied the wrong test when calling for the defence but we do not consider in this case that that should vitiate the convictions for reasons we shall be giving at a later stage in this judgment.

At this point, it would be convenient for us to say that the second principal point of law argued on behalf of the appellants, as we have earlier said, raised the question of whether the competence of the government chemist had been sufficiently established by the prosecution. This point has been dealt with by the Lord President in a separate judgment in which he has concluded that the point is not well founded and with that judgment, the rest of the members of this court respectfully agree.

We now turn to consider the remaining points in this appeal.

It was further argued on behalf of both the appellants that the prosecution had failed to establish beyond reasonable doubt a common intention between the two appellants as laid down in s 34 of the Penal Code (FMS Cap 45) which reads:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The effect of s 34 of the Penal Code (FMS Cap 45) has been discussed in the Indian Privy Council case of *Mahbub Shah v King-Emperor*[31] in these terms (at p 153):

> To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

It will be recalled that the judge had found as a fact that both the appellants had been 'working together' to traffick in drugs and that their 'joint effort' started with the purchase of the car for the price of RM4,300 on 4 May 1983. This was at a time when each of them already had a car of their own. The car was hardly used until 8 September 1983 when the appellant Lee drove it to Haadyai to meet the appellant Khoo and where they did meet each other. The meeting was therefore pre-arranged, and therefore, not a chance one, as alleged by the appellant Khoo.

Having regard to the evidence led by the prosecution, we consider that there was ample evidence from which the only and inevitable inference to be drawn from the facts aforesaid was that there was a common intention

on the part of the appellants to commit the offence charged; to wit, the offence of trafficking in a dangerous drug, namely, the raw opium concerned, and that they did commit that offence in furtherance of such common intention. No other inference was possible and we must therefore concur with the judge's findings regarding this part of the case. A

It was also argued that the judge had wrongly admitted evidence of information allegedly provided by the appellant Lee to Insp Hussein Othman which led to the discovery of the raw opium in the petrol tank of the car. We have already recounted details of this evidence and no useful purpose would be served by repetition. Suffice it to say that in our view the judge had correctly admitted and taken into consideration this evidence in arriving at his decision. B C

Then it was said that the judge when calling for the defence, had failed to have the attention of the defence called to the principal points in the evidence for the prosecution which told against them, with the result that the appellants had to take 'a shot in the dark', as it were, without having the benefit of knowing the facts or the law which weighed on the mind of the court when concluding that there was a case to answer. D

It is a clear and widely known requirement of s 257(i) of the Code that in a trial in the subordinate courts, if, and when, the court calls upon the defence of an unrepresented accused, it shall inform him of his right to give evidence and, if he so elects, to call his attention to the principal points in the evidence for the prosecution which tell against him so that he might have the fullest opportunity of explaining them. E

An omission to comply with this requirement, which has occasioned a miscarriage of justice, will lead to the conviction being quashed (see *Shaari v PP*[32]).

The present appeals are concerned with trials in the High Court in respect of which there is no provision equivalent to s 257(i) of the Code. But, more importantly, the appellants were both represented by experienced counsel, neither of whom had applied to the court to state its reasons for calling for the defence, no doubt because those reasons must have been self-evident to them. Had such an application been made, it would have had to be considered on its merits and the court would then have had to exercise its own discretion in deciding whether or not to accede to it. F G

Here, the record provided shows no trace of either appellant having suffered any prejudice by reason of the judge's omission to explain the principal points in the evidence for the prosecution which told against the appellants. We must therefore hold that there is no substance in this ground of appeal. H

Lastly, it was argued that the judge ought to have held that the defence of the appellants had raised a reasonable doubt either as to the truth of the prosecution's case or as to their guilt. In our view, far from raising such a doubt, the defence of the appellants served merely to strengthen and to confirm the case for the prosecution. We must therefore hold that the judge was right in rejecting the defence as being 'far-fetched and improbable'. I

In the circumstances, although the judge applied the *Haw Tua Tau* test — which, in our view, was the wrong test — when calling for the defence,

A we consider that the error was of no consequence, and did not vitiate the convictions, because, even had he applied the more stringent test to which we have referred and discussed, we are completely convinced that the result would have been the same, having regard to the absolutely overwhelming nature of the case for the prosecution. We are therefore satisfied that no substantial injustice has actually occurred and so we apply the proviso to s 60 of the Courts of Judicature Act 1964, which says:

> Provided that the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

C Accordingly, we have no hesitation in dismissing these appeals and confirming the convictions and sentences of death passed against both the appellants.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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